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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
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11 RONALD J. MULDER,

12 *Petitioner,*

13 vs.

14 JAMES M. SCHOMIG, *et al.*,

15 *Respondents.*
16

2:04-cv-00324-KJD-GWF

ORDER

17 This habeas matter under 28 U.S.C. § 2254 comes before the Court for review on the
18 merits and consideration of whether an evidentiary hearing is required.
19

20 ***Background***

21 Petitioner Ronald Mulder seeks to set aside his 2002 conviction, pursuant to an *Alford*
22 plea,¹ of first degree murder. He was sentenced pursuant to the recommendation in the plea
23 agreement to life imprisonment with the possibility of parole after twenty years.

24 The federal petition presents two grounds. In Ground One, Mulder alleges that he
25 would not have entered the plea but for the ineffective assistance of his counsel in failing to
26 develop an intoxication defense to the specific intent requirement for first degree murder and

27 ¹ See *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)(holding that a
28 defendant can enter a valid guilty plea while still maintaining his innocence where there is a factual basis for the plea and the plea is voluntary, knowing, and intelligent).

1 in instead advising him that intoxication was not a defense. In Ground Two, petitioner alleges
2 that he was denied effective assistance of counsel and due process when his counsel refused
3 Mulder's request to file a direct appeal and instead erroneously advised him that he did not
4 have a right to appeal in the circumstances presented, notwithstanding the limited appeal
5 rights preserved by the plea agreement.

6 In his verified state court petition and supplement together with an attached sworn
7 declaration, Mulder presented the following specific factual allegations as to Ground One.²

8 According to petitioner, Mulder and Charles Whitaker had known each other, were
9 friends and "drinking buddies," and had worked together for a temporary labor service in Las
10 Vegas. On the date in question, they consumed an excessive quantity of alcohol. A nearly
11 empty 1.75 liter bottle of whiskey was later recovered from the scene. On the morning of May
12 19, 2001, Mulder woke up and started drinking. He wanted Whitaker to wake up and drink
13 with him. He made several attempts in various ways to wake him, including "trying to give him
14 a hot foot," with no success. Then, allegedly in a drunken stupor, Mulder poured lacquer
15 thinner on Whitaker and ignited it, catching both men on fire. After putting out the fire on
16 himself, Mulder tried to find water to put out the fire on Whitaker, who still was not moving.
17 When he could not find any water, he used his own blanket to put out the fire. He then found
18 some water to cool Whitaker down, before falling back onto his cot in a stupor. Investigating
19 officers observed that Mulder was intoxicated, that his breath smelled of alcohol, and that his
20 hair and eyebrows were singed.

21 According to Mulder, he told his defense counsel, Curtis Brown, that he did not
22 intentionally kill Whitaker. Brown told him, however, that intoxication was not a defense to the
23 charges in his case. Based upon this advice, he pled guilty to first degree murder.

24 Mulder alleged that defense counsel rendered ineffective assistance in advising him
25 to plead guilty to first degree murder without investigating and developing a defense to the
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28 ²The Court makes no credibility findings or other factual findings regarding the truth or falsity of any
allegations or evidence presented, and it summarizes same solely as background to the issues presented.

1 premeditation element for first degree murder based upon his extreme intoxication. He
2 maintained that a plea or conviction for a lesser manslaughter offense would have been
3 possible had counsel pursued the defense and properly advised petitioner. Petitioner cited
4 Nevada statutory law and case law permitting the fact of intoxication to be taken into
5 consideration in determining purpose, motive or intent, including whether the accused had the
6 requisite intent of premeditation for first degree murder. *See, e.g.*, N.R.S. 193.220; *Nevius v.*
7 *State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985) (“It is true that voluntary intoxication
8 may negate specific intent”); *see also Garner v. State*, 116 Nev. 770, 784-86, 6 P.3d
9 1013, 1022-24 (2000), *overruled on other grounds*, *Sharma v. State*, 118 Nev. 648, 56 P.3d
10 868 (2002).

11 On Ground Two, Mulder presented the following specific factual allegations in the state
12 district court.

13 According to petitioner, the plea agreement advised that he had a limited right to
14 appeal. However, when he asked defense counsel to file an appeal, counsel stated that he
15 did not have a right to appeal; and counsel did not file a notice of appeal as requested.
16 Petitioner alleged that the failure to file the requested appeal and the erroneous advice that
17 he had no appeal rights constituted ineffective assistance.

18 The state district court denied relief on the petition without holding an evidentiary
19 hearing.

20 On appeal, the Supreme Court of Nevada addressed the claim presented in federal
21 Ground One as a claim that “trial counsel was ineffective for allowing [petitioner] to plead
22 guilty to first-degree murder instead of involuntary manslaughter.” The state high court
23 described the relief sought as a request for reduction of petitioner’s sentence or to “allow him
24 to withdraw his plea and proceed to trial.” After reviewing the guilty plea agreement and the
25 record of the plea colloquy, the court rejected the claim on the following basis:

26 The State provided a sufficient factual basis to support
27 Mulder’s plea, and a totality of the circumstances from the record
28 shows that Mulder’s plea was freely, knowingly, and voluntarily
entered. Mulder failed to show how his trial counsel was

1 ineffective for advising him to enter the plea or how his trial
2 counsel was otherwise ineffective in any way. Therefore, we
conclude that the district court properly denied Mulder's petition.

3 *Order of Affirmance*, at 4. The Nevada Supreme Court's order did not otherwise specifically
4 address the claim regarding the failure to file an appeal.

5 After the filing of the federal petition, this Court screened the petition both on the merits
6 and as to potential defenses. Pursuant to Rule 4 of the Rules Governing Section 2254
7 Cases, the Court ordered respondents to answer the petition fully on the merits together with
8 any defenses but without serial presentation of defenses. The order further directed
9 respondents to comply with Habeas Rule 5, which requires the respondents to attach all
10 relevant transcripts and other state court record materials with the answer. #4.

11 Respondents nonetheless filed a motion to dismiss rather than an answer, without
12 complying with Rule 5. The motion to dismiss contended that petitioner's claims were based
13 upon only bare conclusory allegations that failed to state a federal constitutional violation. #7

14 The Court denied the motion to dismiss. The Court again ordered respondents to
15 answer the petition, without serial presentation of defenses, and to comply with Rule 5. #12.

16 In the answer, respondents' counsel objected to the Court's requirement that the
17 respondents answer without serial presentation of defenses. Counsel maintained that the
18 Court's order was in conflict with habeas motion practice and forced respondents to present
19 exhaustion and procedural default defenses at the same time as their answer on the merits.
20 Counsel requested that he be advised if the Court had any authority to the contrary to his
21 position. #13.

22 Notably, however, respondents did not assert any exhaustion or procedural default
23 defenses in this case, either in the motion to dismiss that was filed or in the answer.

24 The answer maintained that the Nevada Supreme Court's rejection of petitioner's
25 claims was neither contrary to nor an unreasonable application of clearly established federal
26 law. Respondents filed with the answer a copy of the plea agreement, the state petition, the
27 state district court's order, and the order of affirmance. Respondents did not include a copy
28 of the plea colloquy transcript, which was expressly relied upon by the state high court.

Discussion

On the merits, petitioner stated viable and factually specific federal claims in the state courts. The claims and petitioner's verified factual allegations were not subject to being rejected without an evidentiary hearing based solely on the plea agreement and plea colloquy transcript. On Ground One, in particular, petitioner may be entitled to relief if his counsel failed to pursue a viable defense on premeditation and the petitioner entered a guilty plea to first degree murder because of erroneous advice that intoxication could not be relied upon in his defense to the required elements of that charge. As the petitioner presented potentially viable claims with supporting verified papers and the claims were rejected on the merits by the state courts without an evidentiary hearing, this Court must hold an evidentiary hearing on the petition. See, e.g., *Insyxiengmay v. Morgan*, 403 F.3d 657, 669-70 (9th Cir. 2005)(standards for holding a federal evidentiary hearing in cases governed by the AEDPA). The Court accordingly will hold an evidentiary hearing on the merits, a step which further requires that the Court appoint counsel for petitioner pursuant to Habeas Rule 8(c).

With regard to respondents' counsel's concerns about this Court's orders,³ Rule 4 of the Rules Governing Section 2254 Cases authorizes the district court to "order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." The Advisory Committee notes to Rule 4 confirm the authority and flexibility of the district court to exercise its discretion and make a pragmatic determination as to the most expeditious manner to proceed in the particular case. Allowance for the filing of a motion to dismiss rather than an answer neither is compelled in all cases nor is it a matter of right by the respondents. Indeed, the very same Ninth Circuit authority that respondents' counsel cites to the Court expressly confirms that "there may be circumstances where concerns about delay and efficiency militate in favor of ordering a full scale answer." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989). The Court's orders in this case do not and have not prevented respondents either from asserting any viable procedural defenses in an answer

³The Court notes that a different deputy attorney general now is enrolled for respondents.

1 or from having any such procedural defenses considered prior to a determination on the
2 merits. The Court trusts that the initial failure to comply with the provisions of the service
3 order issued for this case will not be repeated in future cases.

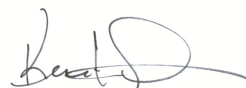
4 IT THEREFORE IS ORDERED that, on a date to be determined, an evidentiary
5 hearing will be held in this matter on the merits and that, pursuant to Rule 8(c) of the Rules
6 Governing Section 2254 Cases and 18 U.S.C. § 3006A, counsel will be appointed for
7 petitioner.

8 IT FURTHER IS ORDERED that the Federal Public Defender for the District of Nevada
9 shall have thirty (30) days to undertake direct representation of the petitioner or to indicate
10 to the Court its inability to represent the petitioner in these proceedings. If the Federal Public
11 Defender is unable to represent petitioner, the Court then shall appoint alternate counsel.
12 The counsel appointed will represent petitioner in all federal proceedings related to this
13 matter, including any appeals or *certiorari* proceedings, unless allowed to withdraw.

14 IT FURTHER IS ORDERED that, if the Federal Public Defender is able to represent
15 petitioner and files a notice of appearance herein, counsel shall state in the notice of
16 appearance the time believed to be necessary to prepare and file an amended petition, taking
17 into account the anticipated investigation and other steps necessary for preparing the
18 pleading. A deadline for the filing of an amended petition will be set after counsel has filed
19 a notice of appearance, in the order confirming the specific appointment. The Court places
20 both counsel on notice of its intention to resolve this case as expeditiously as possible, given
21 the age of the case; but time will be allowed for petitioner's counsel to prepare.

22 The Clerk of Court shall send a copy of this order to the Federal Public Defender and
23 to the CJA Coordinator for the Southern Division.

24 DATED this 21st day of December, 2006.

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KENT J. DAWSON
United States District Judge